Supreme Court, U.S.
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ACTION NO. 87-1750

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WILLIAM IRR, JR.,

Appellant

v.

THE COMMONWEALTH OF KENTUCKY,

Appellee.

ON APPEAL FROM
THE KENTUCKY COURT OF APPEALS

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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MOTION OF APPELLEE TO DISMISS OR AFFIRM

Appellee in the above entitled case moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Kentucky Court of Appeals on the grounds that:

1. This matter should have been presented to the Court by petition for writ of certiorari pursuant to 28 U.S.C. 1257(3) rather than appeal;

2. That, considering this matter as a writ of certiorari pursuant to 28 U.S.C. 2103, reasonable grounds for granting the writ do not exist; and

3. The question presented is so insubstantial that further argument is unnecessary.

STATUTORY PROVISIONS INVOLVED

As will be discussed at greater length in the following argument, KRS 189A.110 is not an issue in this case. The text of that statute, however, and of other statues and court rules cited in this motion (KRS 186.565(3); 189.520(5); 189.520(7); 189A.010; Kentucky Rules of Criminal

Procedure (RCr) 3.02 and 4.24) have been included in the appendix.

STATEMENT OF FACTS

Appellant William Irr, a resident of Illinois, was arrested for driving under the influence of alcohol in Newport, Kentucky, on August 22, 1985, between 2:30 and 2:45 a.m. Officer Mike Henley had observed Irr weaving back and forth across the center line on a one way street, and watched as Irr made a left turn from the right hand lane of that street. When Irr finally pulled over in response to Officer Henley's flashing light, he drove onto the sidewalk.

Officer Henley detected the odor of alcohol on Irr, and took Irr to the police station before conducting any sobriety tests because the officer felt it would be unsafe to give Irr a field sobriety test at the scene due to Irr's apparent highly intoxicated condition.

At the police station, Irr was observed to be "very unsteady" during a heel-to-toe walking

test, and was unable to touch his finger to his nose with either hand.

Officer Henley testified that he requested Irr to take a breathalyzer test "at least three times". The officer's testimony was that Irr would initially agree to take the test, then refuse to do so after being taken out of the holding cell. Irr told the officer that he'd been arrested for DUI in Illinois and would lose his license.

Irr asked for an attorney, but Officer Henley told him that he did not have to provide one prior to the breathalyzer test, and also that he did not have a telephone book with the phone numbers of local attorneys available at the station.

Irr was then taken to jail. Although he testified at trial that a telephone was not immediately available at that time, the jailer who testified as a defense witness did not testify concerning any request for a telephone call. Deputy Jailer Thomas Bechtol testified that Irr

asked him what his bond would be, and was told that the judge would have to set the bond and that there was normally a four hour stay before release when a DUI arrestee had refused the breathalyzer test. After being told about the four hour stay, Jailer Bechtol testified that Irr at that point said, "Well, I'll take one now." Bechtol informed Irr, however, that he was not trained to give the test and did not have a testing machine at the jail.

Finally, testimony at the trial indicated that Irr did not have any cash with him at the time of his arrest, because money had been taken from his wallet while he was in a bar prior to his arrest.

Irr was convicted of DUI by a jury and sentenced to a fine of $250.00. The Kentucky Court of Appeals rendered an opinion following its discretionary review of this case in which it decided that "it is not unreasonable to apply a four hour sobriety period to one who has refused the breathalyzer." The Supreme Court of Kentucky

thereafter denied discretionary review of the opinion of the Court of Appeals of Kentucky.

ARGUMENT

THE CONSTITUTIONALITY OF KRS 189A.110 IS NOT AN ISSUE IN THIS APPEAL.

Although appellant attempts to argue that KRS 189A.110 was interpreted by the Kentucky Court of Appeals to permit an accused to be held "incommunicado" following the refusal of a breathalyzer test, a careful reading of the lower court's unpublished opinion indicates that its ruling is not nearly so sweeping as appellant suggests.

Although accepting discretionary review on the question of the application of KRS 189A.110, the Court of Appeals in its written opinion did not ultimately rule that KRS 189A.110 mandates a four hour incommunicado stay on one who has refused to take a breathalyzer test. What the Court actually ruled is that it is not unreasonable to apply a four hour sobriety period to one who has refused the breathalyzer; and that

"if the authorities have probable cause to believe an individual is unfit to operate a motor vehicle and he refuses the breathalyzer, they may hold him for a reasonable period to regain his sobriety and the four hour hold of KRS 189A.110 is a reasonable period."

KRS 189A.110 reads as follows:

> Any person who is arrested for a violation of KRS 189A.010 and who, upon blood alcohol testing, shows a blood alcohol reading above .15 percent shall be detained in custody at least four hours following his arrest.

This statute specifically provides for the denial of bail immediately to one who would simply be repeating his crime if he drove his automobile home from the police station. The statute does not prohibit the police and jailers from detaining an individual who is obviously intoxicated simply because he exercises his privilege under Kentucky state law to refuse to take a blood alcohol test requested by a police officer. This is not in conflict with previous opinions by this Court that bail should not be granted if there is danger that

the defendant, if given his freedom, will commit crime of a like character. Carbo v. United States, 82 S.Ct. 662, 7 L.Ed.2d 769 (1962); C.f. United States v. Salerno, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (citing cases indicating that mentally unstable individuals may be detained before trial, or those who present a risk of flight or danger to the community).

The Kentucky Court of Appeals found that it was not unreasonable for a DUI arrestee (who could not even touch his finger to his nose) to be held for a four hour period to regain his sobriety. This was a determination which did not depend upon the constitutionality or unconstitutionality of KRS 189A.110. Since the statute is not truly the issue, appeal is not the proper route for presenting the matter to this Court.

NO REASONABLE GROUNDS EXIST FOR REVIEW OF THIS MATTER PURSUANT TO 28 U.S.C. 2103.

Certain conflicts in the evidence at trial are noted in the opinion of the Kentucky Court of Appeals. Irr is asking this Court to assume

jurisdiction of this matter in order to resolve conflicts in the evidence. This Court should deny the invitation.

At no time during Jailer Bechtol's brief trial testimony did he indicate that Irr asked to contact an attorney after his arrival at the jail, or that he insisted on a blood test rather that a breath test. Jailer Bechtol's testimony was that after Irr had been told that there would normally be a four hour stay following situations where a breathalyzer test has been refused, Irr said, "Well, I'll take one now". Irr asked to take a breathalyzer test, not to have a physician draw a blood sample; Officer Henley testified that Irr had already refused the test three times.

Under Kentucky law, an individual charged with having operated a vehicle while under the influence of intoxicating beverages is entitled to refuse a request by police that he submit to a blood, urine, breath or other test. Such refusal, however, results in the revocation of his license (if a citizen of Kentucky) or privilege to operate

a motor vehicle within this state (if a non resident) for a period of up to six months. KRS 189.520(5). An arrestee is entitled to have a duly licensed physician of his own choosing administer a test "in addition" to the one administered at the direction of the police officer. KRS 189.520(7). Unless the arrestee submits to the test requested by police, however, that section of the statute which permits an "additional" test is not applicable. Newman v. Hacker, 530 S.W.2d 376 (Ky. 1975).

The motorist is not entitled to have counsel present when a breathalyzer test is given. Elkin v. Commonwealth, 646 S.W.2d 45 (Ky. App. 1982); citing United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Irr expressly conceded this point at page 10 of the brief he filed with the Kentucky Court of Appeals, Case 86 CA 2821 D.

Irr waived his right to an independent blood test, assuming that he wanted one, by refusing three times to take a breathalyzer test.

Under Kentucky law, the officer is only required to make the request twice, with the second request being made after the person is warned of the effect of his refusal to submit to the test. KRS 186.565(3). It was reasonable for the jailers to delay Irr's initial appearance before a judge until Irr had sobered up and was no longer a danger to himself and others. KRS 189A.110 was not cited to Irr as the reason for this delay; he was simply told that the jailers normally held an arrestee for four hours following refusal of a breathalyzer test. Since it was reasonable to delay Irr's release until he had sobered up, since he refused the test requested by Officer Henley, and since he did not request a blood test while at the police station or jail, it cannot be said that he was improperly prevented from being able to obtain a blood test or denied due process of law.

Finally, given Irr's outward appearance of intoxication, it cannot be said that any blood test he could have obtained would have had exculpatory value to him. C.f. California v.

Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)

Pursuant to RCr 3.02, Irr was taken before a judge "without unnecessary delay" at 9:00 a.m. Irr has never shown or alleged that the jailer on duty that morning had been authorized by the chief judge of the circuit court to take bail, or that the clerk of the court was available at an earlier time than the judge. RCr 4.24.

CONCLUSION

For the foregoing reasons, the appeal docketed by William Irr should be dismissed. In the alternative, the opinion of the Kentucky Court of Appeals should be affirmed. Irr was detained for a reasonable length of time in which to sober up prior to his initial appearance before a judge for release on bail and, as the Kentucky Court of Appeals noted in its opinion (copied in Jurisdictional Statement, p. 3a), it is difficult to understand how he could have been released much quicker. No substantial federal question has been presented to this Court, and the matter should be

dismissed or the lower court judgment affirmed without further argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, the undersigned hereby certifies that on the 9th day of June, 1988, three copies of the foregoing Motion of Appellee to Dismiss or Affirm were mailed, first class postage prepaid, to Honorable Steven L. Schiller, Campbell Towers, 6th Floor, 401 York Street, Newport, Kentucky 41071, Counsel for Appellant.

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Assistant Attorney General

APPENDIX

KENTUCKY RULES OF CRIMINAL PROCEDURE
(RCr)

RCr 3.02
Initial appearance before the judge

(1) An officer making an arrest under a warrant issued upon a complaint shall take the arrested person without unnecessary delay before a judge as commanded in the warrant. If the arrest is made in a county other than that in which the warrant was issued and the arrested person is not taken as commanded in the warrant, he shall be taken before a judge of the county in which the arrest is made, who shall consider the defendant for release on personal recognizance and so release him or admit him to bail for his appearance before the proper judge to whom the bail bond and other papers may be transmitted by mail. If the offense is nonbailable, or if the person arrested is unable to give bail, the judge shall commit him to jail and he shall be taken as commanded in the warrant within a reasonable time by an officer of the county in which it was issued.

(2) Any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a judge, and shall file with the court a post arrest complaint specifying the offense for which the arrest was made and the essential facts constituting probable cause on which the complaint is based. Such complaint need not be verified but shall be signed by the person making the arrest. If the judge before whom the arrested person is taken is in a county other than the county in which the offense was committed, the judge shall proceed as directed in paragraph (1) of this Rule 3.02 as on an arrest under warrant in a county other than that in which the warrant was issued.

(3) If no judge is available in the county in which the arrest was made the defendant shall be taken to jail, and any documents relating to

the arrest shall be given to the jailer. If the defendant is ineligible to post bail under Rule 4.20 or cannot make the bail endorsed on the arrest warrant, the jailer shall take him before the judge without unnecessary delay.

(4) Any documents relating to the arrest that are in the possession of the jailer shall be delivered to the clerk on or before the next business day.

RCr 4.24
Officers authorized to take bail

When the amount of bail has been fixed either by the court or by the uniform schedule of bail, it may be taken by the clerk of the court in which the defendant is held to appear. Any other bonded public officer may be authorized by the chief judge of the circuit court to take bail, but only if the clerk of the court is unavailable. The individual with whom deposits are made shall ascertain that the amount deposited is no less than the amount fixed by the court.

KENTUCKY REVISED STATUTES
(KRS)

KRS 186.565 Consent to test for alcohol in blood; procedure upon refusal; ruling; judicial review; exception; application to court to enter driver's education program

(3) If a person under arrest refuses upon the request of a law enforcement officer to submit to a test designated by the law enforcement agency as provided in subsection (1) of this section, the requesting officer shall warn the person of the effect of his refusal to submit to the test. If the person again refuses, none shall be given, but the transportation cabinet, upon the receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving or was in actual physical

control of a motor vehicle in this state while under the influence of intoxicating beverages or other substances which may impair one's driving ability, that the person refused to submit to the test upon the request of the law enforcement officer, and that the person again refused to submit to the test after the law enforcement officer warned him of the effect of his refusal, the cabinet shall immediately serve notice upon said person in writing by mailing the notice to the person by certified mail to the last known residence address of the person or if the address is unknown, to the last known business address of the person to appear before the secretary or his duly authorized agent and show cause why his license to operate a motor vehicle, or if said person is a nonresident his privilege to operate a motor vehicle within this state should not be revoked; or if the person is a resident without a license or permit to operate a motor vehicle in this state why that person should not be denied the issuance of a license or permit. The hearing shall be scheduled as early as practical but not sooner than ten (10) days after the issuance of the notice and at a time and place designated by the secretary.

KRS 189.520 Operating vehicle while under influence of intoxicants or substance which may impair driving ability prohibited; presumptions concerning intoxication

(5) No person may be compelled to submit to any test specified in subsection (3) of this section, but his refusal to submit to such a test shall result in revocation of his license as provided in KRS 186.565(3).

(7) The person tested shall be permitted to have a duly licensed physician of his own choosing administer a test in addition to the one administered at the direction of the police officer.

KRS 189A.010 Operating motor vehicle while under the influence of alcohol or other substance which may impair driving ability prohibited; penalties

(1) No person shall operate a motor vehicle anywhere in this state while under the influence of alcohol or any other substance which may impair one's driving ability.

(2) Any person who violates the provisions of subsection (1) of this section shall:

(a) For the first offense, be fined not less than two hundred dollars ($200) nor more than five hundred dollars ($500) or be imprisoned in the county jail for not less than forty eight (48) hours nor more than thirty (30) days or both. Following sentencing, the defendant may apply to the judge for permission to enter a community labor program for not less than two (2) days nor more than thirty (30) days in lieu of fine or imprisonment, or both, provided that his offense does not come within the purview of subsection (4) of this section.

(4) When sentencing persons convicted of violating subsection (2)(a) of this section at least one (1) of the penalties shall be assessed and that penalty shall not be suspended, probated, or subject to conditional discharge or other form of early release. If a person other than the person convicted of violating subsection (1) of this section dies or has suffered physical injury, as defined in KRS 500.080, as a result of the convicted person's operation of a motor vehicle in violation of subsection (1) of this section, the sentence shall include imprisonment as specified in subsection (2)(a) of this section and that portion of the sentence shall not be suspended, probated, or subject to conditional discharge or other form of early release.